Teong Lung Chiong & Ors v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NOS Q–O5–17 OF 1996, Q–O5–20 OF AND Q–O5–21 OF 1996
DENIS ONG, MOHD SAARI AND MOHD NOOR AHMAD JJCA
7 MARCH 2003

Criminal Procedure *— Appeal — Conviction, against — Appellants convicted for murder — Convictions pitched on common intention based on the combined effect of cautioned statements of appellants — Whether cautioned statement of appellants tantamount to confession of murder — Whether there were any other evidence independent of the cautioned statements to support conviction of murder — Whether prosecution had proved beyond reasonable doubt the guilt of the appellants*

The deceased went missing whilst walking towards the direction of her home. Two days later, a missing person report was lodged with the police. About two months later, the deceased's elder sister received some letters demanding a sum of money for the return of the deceased. The letters were passed to the police. On the advice of the police, another sister of the deceased was instructed to deliver the money to the address given in the letter. A police surveillance was put into motion, during which about two days later the first appellant came on a motorcycle and collected the money. The first appellant was then arrested. Upon interrogation, the first appellant led the police to the discovery of the skeletal remains of a human being which were eventually identified to be that of the deceased. The cause of the death was certified to be 'indeterminable but the ligature with the reap knot suggests strangulation'. Subsequently, the second and third appellants and another person were arrested. In the course of investigation, they each gave a cautioned statement to the police. The prosecution tendered the cautioned statements and after a trial-within-a-trial the cautioned statements were admitted. In their respective cautioned statements, each appellant pushed the blame for the act of strangulation of the deceased to death on the others and maintained that he did not participate in the act of strangulation but was merely watching the killing helplessly. The appellants were convicted and sentenced to death for murder. The conviction of the appellants for murder pitched on common intention was based solely on the combined effect of their cautioned statements.

Held, allowing the appeal:

(1) The cautioned statement of each appellant was not tantamount to a confession of murder, although in the cases of the second and third appellants, they were a confession to having committed rape on the deceased. Therefore, they were not a confession for the offence of murder as charged to merit any consideration under s 30 of the Evidence Act 1950 (see p 507D–E).

(2) Assuming that the cautioned statements were tantamount to confessions of murder, there had to be other evidence

independent of the cautioned statements sufficient to support the conviction of murder. In this case, there was no such evidence. In respect of the first appellant, although there was evidence against him that he wrote the ransom notes, he was caught collecting part of the ransom money, part of which was subsequently found in his possession, and he cooperated with the police leading to the discovery of the deceased's bones and the arrest of the other appellants, to the minds of the Court of Appeal judges, that evidence was not sufficient to base a conviction of murder against him (see p 507E–F).

(3) It is a cardinal principle in criminal law that it is the burden on the prosecution to prove the guilt of the appellants beyond reasonable doubt. Having scrutinized the evidence in this case, the court was satisfied that the prosecution had failed to do so (see p 508C).

[Bahasa Malaysia summary

Si mati telah hilang semasa berjalan menuju ke rumah beliau. Dua hari kemudian, satu laporan orang yang hilang telah dibuat kepada pihak polis. Dua bulan kemudian, kakak si mati telah menerima beberapa pucuk surat menuntut sejumlah wang jika inginkan si mati pulang. Surat-surat tersebut telah diberikan kepada pihak polis. Atas nasihat pihak polis, seorang lagi kakak si mati telah diarahkan untuk membawa wang tersebut ke alamat yang diberikan di dalam surat tersebut. Satu pengawasan polis telah diadakan, di mana dua hari kemudian perayu pertama telah datang dengan sebuah motorsikal dan mengambil wang tersebut. Perayu pertama kemudian telah ditangkap. Setelah disoaljawab, perayu pertama telah membawa pihak polis ke tempat di mana ditemui sisa tulang-tulang manusia yang kemudiannya dikenalpasti sebagai si mati. Sebab kematian tersebut disahkan sebagai 'indeterminable but the ligature with the reap knot suggests strangulation'. Berikutan itu, perayu-perayu kedua dan ketiga dan seorang lagi telah ditangkap. Semasa siasatan dijalankan, masing-masing telah memberikan satu pernyataan beramaran kepada pihak polis. Pihak pendakwa telah menyerahkan pernyataan-pernyataan beramaran tersebut ke mahkamah dan selepas satu perbicaraan dalam perbicaraan, pernyataan-pernyataan beramaran tersebut telah diterima masuk. Dalam pernyataan beramaran masing-masing, setiap perayu menyalahkan antara satu sama lain terhadap perbuatan mencekik si mati sehingga mati dan menegaskan bahawa masing-masing tidak terlibat dalam perbuatan mencekik tersebut tetapi hanya melihat pembunuhan tersebut dan tidak berupaya berbuat apa-apa. Perayu-perayu telah disabitkan dan dijatuhi hukuman mati kerana membunuh. Sabitan perayu-perayu kerana membunuh dengan niat bersama adalah berdasarkan semata-mata atas kesan gabungan pernyataan-pernyataan beramaran mereka.

Diputuskan, membenarkan rayuan tersebut:

(1) Pernyataan beramaran setiap perayu tidak sama seperti pengakuan membunuh, walaupun dalam kes perayu kedua dan ketiga, terdapat pengakuan merogol si mati. Oleh itu, ia bukan satu pengakuan untuk kesalahan membunuh sebagaimana yang dituduh untuk memeritkan apa-apa pertimbangan di bawah s 30 Akta Keterangan 1950 (lihat ms 507D–E).

(2) Dengan mengandaikan bahawa pernyataan-pernyataan beramaran tersebut sama seperti pengakuan membunuh, perlu ada keterangan berasingan yang lain daripada pernyataan-pernyataan beramaran tersebut yang mencukupi untuk menyokong sabitan pembunuhan tersebut. Dalam kes ini, tiada keterangan sedemikian. Berhubung perayu pertama, walaupun keterangan terhadap beliau bahawa beliau telah menulis surat, beliau telah ditangkap semasa mengambil sebahagian wang tersebut, sebahagiannya yang kemudiannya didapati dalam milik beliau, dan beliau bekerjasama dengan pihak polis dalam menunjukkan di mana rangka mayat si mati ditemui dan penangkapan perayu-perayu yang lain, pada pemikiran hakim-hakim Mahkamah Rayuan, keterangan tersebut tidak mencukupi untuk mendapati satu sabitan membunuh terhadap beliau (lihat ms 507E–F).

(3) Ia adalah prinsip utama dalam undang-undang jenayah bahawa ia adalah beban ke atas pihak pendakwa untuk membuktikan kesalahan perayu-perayu melampaui keraguan munasabah. Setelah meneliti keterangan dalam kes ini, mahkamah berpuas hati bahawa pihak pendakwaan telah gagal berbuat demikian (lihat ms 508C).]

Notes

For cases on appeal against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 232–248.

Cases referred to

Herchun Singh & Ors v PP [1969] 2 MLJ 209 (refd)
Sivalingam v PP [1982] 2 MLJ 172 (refd)

Legislation referred to

Evidence Act 1950 s 30

Appeal from: Criminal Trial No 4 of 1993 (High Court, Sibu)

Joseph CC Tang (*Tang & Co*) for the appellants.
Ishak Mohd Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court): The appellants were convicted and sentenced to death for murder. The charge reads:

> That you, on the 14 July 1991, between 2pm–5pm in a hut at 8½km, Teku Road, Sibu, in the State of Sarawak, in furtherance of the common intention of you all, committed murder by causing the death of Hew Leh Poh (f), and you thereby committed an offence punishable under s 302 of the Penal Code read with s 34 of the same Code.

Briefly, on the evening of 14 July 1991, the deceased went missing whilst walking towards the direction of her home. Two days later, a missing person report was lodged with the police. The initial investigations by the police did not produce any positive result. However, about two months later, the deceased's elder sister received some letters from one who signed himself as Steven Ting demanding a sum of money ranging from RM10,000 to RM15,000 for the return of the missing girl. The letters were passed to the police. On the advice of the police, another sister of the deceased was instructed to deliver RM3,000 in marked notes to the address given by Steven Ting at PO Box 947 located at the Sibu post office. A police surveillance was put into motion, during which about two days later the first appellant came on a motorcycle and collected the money from the said PO Box and thereafter rode off. The registration of the motorcycle based on its number as noted by the police was traced to the first appellant. On 14 October 1991, the first appellant was arrested. Upon interrogation about the missing girl, the first appellant led the police to the discovery of the skeletal remains of a human being at Km 37 Durin Road, Sibu which were eventually identified to be that of the deceased. The cause of the death was certified to be 'indeterminable but the ligature with the reap knot suggests strangulation'. Subsequently, the second and third appellants and another person were arrested. In the course of investigation, they each gave a cautioned statement to the police. The cautioned statements were tendered by the prosecution and after the trial within a trial, they were admitted except that of the other person arrested who was acquitted and discharged without his defence been called.

In the respective cautioned statements, the first appellant admitted having invited the deceased to go for a joy ride in a car driven by the other person with the three appellants inside. He also admitted having sent the ransom notes. However, he denied that he raped the deceased but stated that the deceased was raped by the others and thereafter, the second appellant and the other person strangled her to death with nylon rope. The second appellant admitted having raped the deceased and stated that all of them took turns to rape her. He denied that he strangled the deceased but stated that the strangulation was done by the third appellant and the other person. The third appellant also admitted having raped the deceased and denied that he strangled her but pushed the blame for the strangulation on the first appellant and the other person.

It is manifestly evident that the conviction of the appellants for murder pitched on common intention is based solely on the combined effect of their

A cautioned statements. In their respective cautioned statements, each appellant pushed the blame for the act of strangulation of the deceased to death on the others and maintained that he did not participate in the act of strangulation but was merely watching the killing helplessly.

A scrutiny of the judgment reveals that the learned judge had gathered B the common intention to murder the deceased by inferences, mainly, from: (i) the conduct of each appellant in not preventing the others from strangling the deceased to death but simply watching the deceased being slowly strangled and choked to death; (ii) the fact that the deceased was earlier raped by each of them and that they would be in trouble if they were to let the deceased free and therefore, there was a need to kill the deceased; C and (iii) their participation in actively assisting each other in the clumsy disposal of the deceased's body. Although the learned judge did not categorically indicate that he applied the provisions of s 30 of the Evidence Act 1950 ('the Act'), in reality, he took into consideration the contents of each of the cautioned statements as confession as against the other appellants.

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In our view, with due respect, the learned judge erred in his approach leading to the conviction on the following grounds.

Firstly, the cautioned statement of each appellant does not tantamount to confession of murder, though in the cases of the second and third appellants, they are a confession to having committed rape on the deceased. E Therefore, they are not a confession for the offence of murder as charged to merit any consideration under s 30 of the Act. Secondly, even assuming that the cautioned statements tantamount to confession of murder, there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder. In this case, there was no such evidence. F In respect of the first appellant, although there was evidence against him that he wrote the ransom notes, he was caught collecting part of the ransom money, part of which was subsequently found in his possession, and he cooperated with the police leading to the discovery of the deceased's bones and the arrest of the other appellants, to our mind, that evidence is not sufficient to found a conviction of murder against him. In *Herchun Singh & G Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 210, the Federal Court held:

> ... we would express our qualified agreement with the judgment of Ismail Khan J (as he then was) in *PP v Lai Pong Yuen* [1968] 1 MLJ 12 at p 14 where he followed *Bhuboni Sahu v The King* AIR 1949 PC 257 and *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159, but not in the sense expressed by the learned Chief Justice in *Gunadhar Das v State* AIR 1952 Cal 618. In H *Lai Pong Yuen*, the judge said:
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> > 'It is clear from a long line of authorities that a confession of a co-accused is only an element in the consideration of other evidence, *which evidence must be sufficient to support a conviction*.'
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> In *Gunadhar Das*, it was said similarly:
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> > 'In short the conviction must be based on the other evidence. The confession can only be used to help to satisfy a court that the other evidence is true.'

In our judgment however, the proper interpretation of section 30 is that of Bose J in *Kashmira Singh* as follows:

> 'The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether "if it is believed", a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, "if believed", it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.' (Emphasis added.)

It is a cardinal principle in criminal law that it is the burden on the prosecution to prove the guilt of the accused beyond reasonable doubt. Having scrutinized the evidence in this case, we are satisfied that the prosecution failed to do so.

We do realize that the trial was conducted with the aid of assessors. And indeed, we do appreciate the grief and tears of the deceased's relatives over the loss of their loved one. Our sympathies are with them. Also, we are fully aware of the public's disapproval and anger as to the cruel manner the deceased met with her death, as revealed in the cautioned statements. However, in the interest of justice, we have no choice but, with the greatest reluctance, to allow the appeals.

Although other offences have been revealed in the respective cautioned statements, on decided authorities, we are constrained from considering and convicting them for the offences (see *Sivalingam v Public Prosecutor* [1982] 2 MLJ 172). This is within the realm of the discretion of the Attorney-General to consider.

Therefore, each appeal is allowed. Conviction and sentence are set aside.

On the disposal of the exhibits, we confirm the order made by the learned judge (re record of appeal Vol 11 at p 809).

Appeal allowed.

Reported by Peter Ling